

# THE

# ARIZONA *Fiduciary*

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WINTER 2004

This issue of The Arizona Fiduciary is  
dedicated to the memory of Donna Zern.

## Letter from the President

*By Peter Frenette*  
*AFA Incoming President*

I am appreciative for the prior election to the board and this year the presidency. Under Patricia Ian's leadership the AFA's membership grew and her opinions have shaped the industry. I am fortunate to follow a path she has paved and grateful she remains on the board. I would also like to thank Peter Santini, Francine Saccio, Miriam Kennedy, Charlie Tomlinson and Bill Nye for the tremendous contributions they made serving on the board last year.

It is an honor to be part of a very active board and a growing membership. This year the board is comprised of Greg DoVico, Vice president; Pam Johnston, Secretary; Roger Coventry, Treasurer; Patricia Ian, Ex Officio; Robert Fleming, Member; Catherine Robbins, Member, Mary Espinoza, Member, Jim Clark, Member, and Nancy Alexander, Member. We will strive to serve the AFA, its members and the industry well.

I encourage you to participate in the functions of the AFA. Please contact and offer your support to the following committee chairs: Jim Clark, Education; Pam Johnston, Membership; Robert Fleming, Legislative; Mary Espinoza, Public Fiduciary Representative and Fiduciary Advisory Commission; Nancy

Alexander, Ethics; Greg DoVico, Private Fiduciary Representative, Business Committee; and Patricia Ian, Newsletter (phone and e-mail addresses published on the first page of this newsletter).

Our industry is growing and changing. There are many new needs of our members. There will be increasing demands of the AFA. To meet those needs, the AFA needs to look deep and evaluate how to meet those challenges. Roger Coventry is going to facilitate a strategic planning meeting for the AFA on Wednesday, January 28, 2004 at the Maricopa County Sheriff's Training Facility from 9:00 a.m. to 1:00 p.m. Please call Peter Frenette at (480) 726-9581 if you plan to attend. We solicit your input and opinions as we go through this process and particularly your participation at the session on January 28<sup>th</sup>. Other planning sessions will be published on the list-serve. You may contact Roger Coventry with your constructive input.

The certification of professional fiduciaries has elevated our industry. The AOC's Certification Unit has created a regulatory infrastructure to work within and which we must contribute to. Beginning this year the AFA will be offering education for new certification candidates and will continue our educa-

*Continued on page 3*

## THE *ARIZONA* *Fiduciary*

The Quarterly Newsletter of the Arizona Fiduciaries Association, Inc.—An Affiliate of the National Guardianship Association

**Winter 04 - Volume 11, Number 1**

**Arizona Fiduciaries Association, Inc.**

AFA is a non-profit organization whose purpose is to provide structure, guidance, training and continuing education for public and private fiduciaries in Arizona.

### **AFA Membership**

AFA welcomes individual memberships regardless of profession. Annual dues are \$60.00 payable each October 1.

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*(continued on page 2)*

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Continued from page 1

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## Have you Moved?

Have you recently moved or changed jobs, changed your phone number, email address, etc.? If so, we would like to hear from you so that we may keep a current database of AFA members. Please send your new information to:

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# How to Join the AFA Listserv

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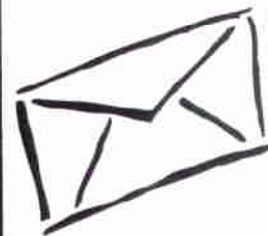
## Have you Ordered Your "What Is A Fiduciary" Booklets Yet?

This is the booklet AFA has produced for several years for the general public. It describes the work and services provided by Arizona's fiduciaries.

Copies of the new Third Edition of the booklet are available for distribution and feature a "Compliments Of" box on the back cover, where you can stamp the name of your firm for a bit of advertising.

If you are a for-profit business, the price is 50 cents per booklet to cover our printed costs, plus \$5.00 for shipping and handling. If you are a public agency or non-profit organization, booklets are available at no cost to you.

To order, if you are a government or non-profit agency, e-mail or mail your request to Allan Rouse and your order will appear in your mailbox. If you are a for-profit business, mail your order to Allan with check made out to "AFA."



### Send Requests and Payments to:

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# Parting Words

By Patricia Ian, Yavapai  
County Public Fiduciary  
AFA Past President

As the outgoing President of the AFA, I want to thank all of the board members and general members for the opportunity of serving as your President this past year. Although a year is hardly enough time in which to accomplish as much as one would like, it is difficult for any of us to commit to a longer term in view of the challenges we currently face in our profession. No one will dispute the fact that it has become increasingly more difficult to be a certified fiduciary. Some of the standards of our profession are perhaps the highest of any comparable profession. This is in large part because we are in charge of the lives and financial resources of persons who are unable to defend themselves or to even be aware of any exploitation or fraud that might be taking place.

It is my belief that the vast majority of responsible professional fiduciaries are doing their very best to serve their clients for the client's well-being because they truly care about each client. Although I'm in the public sector, I doubt that either private or public fiduciaries are in this profession because it's "easy money."

Making life-changing decisions about others' lives on a daily basis, being accessible twenty-four hours a day seven days a week, and keeping impeccable records of our every move, just to name a few of our responsibilities, is not an easy job. How many of us hear every day from someone the words "I wouldn't want your job for anything". It's simply not an easy job. And yet we continue to serve as professional fiduciaries in spite of the bar continually being raised and our duties and liabilities continually being increased.

As members of an association of professional fiduciaries, we must support each other, share our knowledge and experience, and act with the highest integrity. We are each our best ambassadors in promoting this profession as one of protecting our clients and preserving their rights to the extent they are capable of exercising them. Arizona is the first state to enact certification of fiduciaries and others are following. There is no turning back, so we must use this opportunity to improve our profession and the integrity of the legal process.

## President's Message

*Continued from page 1*

tion for those already certified. The AFA has a history of representation on the Certification Unit's constituency boards. There are 3 certified fiduciaries currently on the Fiduciary Commission. The terms of some commission members will be expiring and I encourage you to apply with the AOC for any vacancy.

The Education Committee chaired by Jim Clark and a committee headed by Catherine Robbins are busy planning our spring conference in **Lake Havasu on May 13 and 14, 2004**. Be sure to mark your calendars now.

Again, thank you for the opportunity to serve you. The AFA exists to serve its members in providing information, education and networking support. I will work with you to increase the solidarity among the AFA members. Please let me know what I can do for you.

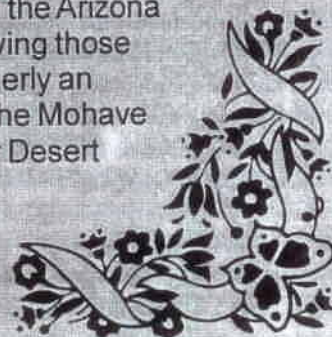


## In Memory of Donna Zern

Donna M. Zern (Donna M. Lam) died on December 31, 2003. Donna was a professional fiduciary for a collective total of 19 years. Over the past two years she was the successor President and Co-owner of Mohave Estate Management Office, Inc., the fiduciary services corporation originally formed by Joanne Pope, formerly a certified fiduciary in Kingman, AZ.

Donna was appointed by Chief Justice Charles E. Jones to serve on the Arizona Supreme Court, Fiduciary Advisory Commission. She was dedicated to serving those persons in need of protective services in Mohave County. Ms. Zern was formerly an employee of the State of Arizona, Adult Protective Services. She served as the Mohave County Public Fiduciary and performed fiduciary services in New Mexico for Desert Life Management, Inc.

Ms. Zern is survived by three children, one granddaughter and her parents Bea and George Lam. Donna will be greatly missed by all who knew her.



# Everything You Always Wanted (and Needed) to Know About ACJA Code Changes to Sections 7-201 and 7-202

By J. R. Rittenhouse  
Fiduciary Program Manager  
Arizona Supreme Court, Certification and Licensing Division

Happy New Year! It's now official: Significant changes to the code sections affecting the certification of fiduciaries in Arizona are in effect as of January 1, 2004. These changes for code sections 7-201 and 7-202 will be included in the latest printing of the code books and will be mailed to all certified fiduciaries in the packet for renewal of their certificate. The renewal packets should be ready for mailing by January 31, 2004. If you do not receive a packet to renew your certificate by Valentine's Day, 2004 please contact the Fiduciary Certification Program at pfp@supreme.sp.state.az.us or Kandace French at (602) 364-0387. If you wish you may download the new code sections at the Fiduciary Program's website at [www.supreme.state.az.us/fiduc](http://www.supreme.state.az.us/fiduc) for review before receiving the hard copy with a renewal packet.

The Arizona Code of Judicial Administration (ACJA) is adopted pursuant to the Arizona Constitution to "implement the supreme court's Article 6, Section 3 administrative supervision of all courts in the state." The current code is divided into sections and is available in its entirety at the Supreme Court's website at [www.supreme.state.az.us/orders/admcode/curcode.htm](http://www.supreme.state.az.us/orders/admcode/curcode.htm).

ACJA Section 7-201: General Requirements ("7-201") affects not only the Fiduciary program, but the Confidential Intermediary and Defensive Driving Programs, also administered by the Certification and Licensing Division ("CLD") of the Administrative Office of the Courts ("AOC"). ACJA Section 7-202: Fiduciaries ("7-202") applies only to the Fiduciary Certification Program but should be read in conjunction with 7-201. Section 7-201(B): Applicability states: "In the event of any conflicts between this

section and the program specific section, (for fiduciaries, 7-202) the program specific section shall govern."

These two particular code sections have undergone rewrites, including major technical and substantive changes. The codes were reviewed by many bodies and staff including the standing Confidential Intermediary Committee, Defensive Driving Schools, the Fiduciary Commission, AOC staff, CLD staff and during a lengthy public comment period, certified fiduciaries and the public. The period ran from June 24 through August 15, 2003 enabling those on summer vacation to have an opportunity to be heard. In addition, the Fiduciary Certification Program held two 1-hour round table/public comment sessions on the code changes in Phoenix, July 30, 2003 and in Tucson on July 31, 2003. After all suggested changes and modifications were summarized, including those required by AOC legal staff for technical corrections or appropriate legal requirements, the sections were reviewed and officially adopted by the Arizona Judicial Counsel ("AJC") on October 15, 2003. On December 4 and 17, 2003, Chief Justice Charles Jones signed the administrative orders effectuating sections 7-201 and 7-202 for January 1, 2004, respectively.

The following is a summary of the major changes to the code sections and is meant only to highlight and is not an inclusive detailed summary of all the changes reflected in the code sections. In addition, the summary is not to be interpreted as putting forth any one of the new changes as having more importance than any other change(s); or to infer the change(s) have more importance over the current codes, especially those areas not having undergone any change(s). All

certified fiduciaries are responsible for understanding and being in compliance with the statutes, codes and administrative orders for the Fiduciary Certification Program.

## § 7-201: GENERAL REQUIREMENTS

The proposed changes to 7-201 were not done in the usual legislative formatting style when presented to any commission, committee or staff, or when sent out for public comment. There were numerous changes to what used to be known as General Rule 1, essentially resulting in a complete rewrite; therefore it was believed legislative format would have been too confusing. For those of you unfamiliar with legislative format, new material is done IN UPPONT CAPITAL STYLE and deletions are done with ~~strikethroughs~~. Changes to 7-201 incorporate existing practices which, although not written in the original Rule 1, have been followed by the various certification programs for some time in performing their role in administering the programs governed by 7-201. These procedures are based on models from other professions including the admission and regulation of attorneys, physicians, teachers and realtors. Some highlights are:

1. New definitions in Section A: for example, "censure," "inactive," "letter of concern", "formal proceedings," etc.
2. There are no changes or additions to Section B, but a reminder to the reference here - any resolution of conflict between sections, the program specific section rules.
3. New under Section C, an official



## ACJA Code Changes

*Continued from page 4*

- statement of the purpose of certification "protection of the public".
4. Section D deals with audits and compliance reviews, including the Director's role in these audits and reviews. Working papers of the auditors and reviewers are confidential, only the final report is public; but failure to comply with an audit or the corrective action plan is grounds for the Director to issue an order to comply. As to the Deputy Director, the code now spells out more clearly the role as the probable cause panelist for the discipline process and the Deputy has the ability to initiate an investigation rather than the Director, providing for due process for the certificate holder, as the Director is the final decision maker.
  5. New language in Sections E(3)(e) & (f) deal with access to and retention of certification records. These confidentiality provisions are consistent with Court Rule 123, Public Access to Court Records. Rule 123 does not currently specifically address certification records. On the advice of AOC legal counsel language was added to address the issue of confidentiality of records in 7-201 for applicants and certificate holders. In 7-201, Section E was adopted from already existing practices in force in other sections and programs. E(2)(e) specifically requires the applicant to request the program in writing if the applicant wishes to re-take an examination for initial certification after failing the examination. More details and reasons for possibly denying initial certification are spelled out in E(3)(c) and focus on the underlying themes of misrepresentation of information or documents to any court or tribunal as grounds for denial. Finally section E adds new provisions regarding the unlawful use of the designation of certification.
  6. Section F adds new provisions

regarding a response from a certificate holder F(4), candor F(5) and inactive status F(8).

7. Sections G deals with renewal of a certificate and although new to 7-201 is very similar to what fiduciaries have already been doing under 7-202.
8. Section H deals with the area of complaints and discipline. This section is much more detailed than the previous General Rule 1 and is laid out in a more logical progression of the discipline process. As was stated in the opening paragraph, this is a codification of the process already in existence within the AOC's practices. The specific role of the probable cause panelist and document status once probable cause is reached are now spelled out; a guideline timeframe for complaint resolution is now in 7-201; and new terms are added and defined, such as default, non-abatement and status of complainant in H(11), (12) and (13), respectively.

### § 7-202: FIDUCIARIES

The proposed changes to 7-202 were both technical and substantive. Substantive changes were based on the experiences of the Fiduciary Program and recommendations of the Fiduciary Commission. The original draft sent out for public comment was developed in conjunction with the Fiduciary Commission and was done in legislative format. Changes to 7-202 have undergone extensive review by the Commission, the certified fiduciary community and the general public. Administrative changes to 7-202 were developed not only in conjunction with the Commission and experience of the program, but as was done with 7-201, procedures and models from other professions including the admission and regulation of attorneys, physicians, teachers, court reporters and realtors were reviewed. Some highlights are:

1. New definitions in Section A, including a revamping of the definition of principal and the new term of "trainee".

2. Section D designates the Deputy Director as the final decision maker in appeals of continuing education credits. (More about CEs later when Appendix C is reviewed)
3. New language in Section D(4)(b) states the **program coordinator will no longer provide initial or renewal training sessions to fiduciaries or the public after May 31, 2004.**
4. Section E. Initial Certification, provides for reform to the examination and certification process. Under E(2)(a-h) new criteria developed by the Fiduciary Commission establishes a combination of criteria necessary for any candidate seeking certification. After June 1, 2004 a combination of one of these criteria must be met by the candidate in order to sit for the Fiduciary Program's examination. E(4) states the only training the program will provide after June 1, 2004, is a session on the role and responsibilities of the certified fiduciary, *after* the candidate successfully passes the examination.
5. Continuing with Section E. Initial Certification, specifically, E(b-d) the role and responsibility of principals is further defined and now provides guidance for examples of time frames and alternatives for who may serve as principal.
6. Section F adds specific language on the use of a certificate holder's number, a timeframe to report information, a new provision regarding the supervision of trainees in F(7); and finally, F(8) provides for an affirmative duty to report misconduct, as the statute §14-5651 covers immunity for the certified fiduciary.
7. Section G still sets out the conditions for renewal training. Beginning with the next renewal cycle, commencing June 1, 2004, all certified fiduciaries will still continue to be required to attend and receive credit for 20 hours of continuing education ("CE"), 3 of which must be in ethics, see G(2).

*(continued on page 6)*

## ACJA Code Changes

Continued from page 5

8. In *Appendix A*, the Code of Conduct, includes some technical changes and in keeping with 7-201(F), new Standard 2.f. Also new are 4.b and 5.b, now requiring a pictorial record and stewardship of property for conservatees' and decedent's estates.
9. *Appendix B*, the Fee Schedule has new amounts and new fees effective June 1, 2004. Beginning in June 2004, there will no longer be different amounts for any individual seeking certification, whether they are a member of a public fiduciary office or a private individual. FYI - the fingerprint fee has gone up to \$29.00, (set by Arizona law, not by the program) and there will now be late fees for applications or costs for no shows at functions; and beginning June 1, 2004 there will be a nominal charge to replace or have name changes completed on certificates.
10. *Appendix C*, is a brand new appendix and provides the guidelines to certified fiduciaries for the program's continuing education policies. These program policies are consistent with other programs administered by CLD. I would advise all certificate holders, even those who have been intricately involved in this process, to please read this section completely, as it effects not only the current renewal cycle but will **initiate a major change** with the cycle beginning June 1, 2004.
  - a. The biggest change in the CE policy for the current renewal cycle ending May 31, 2004, is the ability of the certificate holder to receive credit of activities they may have performed already in obtaining the 10 outside the AOC hours. These credits may include serving as faculty as defined under F, authoring an article under G, or attending a conference under L. Until the completion of this renewal cycle on May 31, 2004 any certified fiduciary still needs to receive 10 inside and 10 outside the program (or 5 and 5, if certified recently), there are no exceptions.
  - b. With the cycle beginning June 1, 2004 the CE policy will become "self-reporting", similar to what the Arizona State Bar system uses. You, the certificate holder, will be

responsible for obtaining and maintaining proof of the required 20 CE hours, 3 of which must be ethics, during the renewal cycle. Please note caveats in the CE policies, such as

- i. I. Self Study - you cannot complete your 3 hours of required ethics under self-study;
- ii. M. Proration, - you cannot have prorated hours of CE if you allowed your certificate to lapse and received new certification after requalifying during the renewal cycle;
- iii. Q. Non-qualifying items - you cannot use your time spent serving on a committee or as an officer of a professional organization as CE.

The reporting part comes at the end of the renewal cycle, Spring 2006. You will be asked to sign an affidavit on the renewal application attesting you have completed all 20 hours, including 3 of ethics. If you are randomly selected for compliance with this requirement you will be asked to submit proof of completion of all CEs. Since this is an entirely new section, after you have read it and if you have a question, please contact the program at [pfp@supreme.sp.state.az.us](mailto:pfp@supreme.sp.state.az.us), or fax your questions to (602) 364-0358 or contact Kandace at (602) 364-0387.

Renewal training events, including locations and dates have all been established to assist those who have not completed all 10 hours of CE from the program and are posted on the website. The video viewing sessions in Phoenix will repeat throughout the days on February 20 and March 16, 2004. As soon as we have finalized the schedule of what topic will be shown at what time and, in which room at the Judicial Education Center, on those days, we will update the website [www.supreme.state.az.us/fiduc](http://www.supreme.state.az.us/fiduc). The program's scheduling of these video presentations should allow for individuals to adjust their work and or personal schedules to meet any needed hours for renewal of their certification. If you are still short the required 10 hours from outside the program, we suggest you check with the State Bar Mental Health or Probate Sections for any future offerings as they are "pre-approved" groups.

***The Fiduciary Certification Program Staff wish all a happy and prosperous New Year!***

# Guardianship: Consider the Alternatives

by Richard T. Vanderheiden

*The following article was published in the Fall, 2003 edition of the National College of Probate Judges magazine, Life & Times.*

Most state statutes have two requirements for ordering a guardianship: a finding the person is incapacitated and a finding guardianship is necessary. If a guardianship petition is filed and fees paid, the presumption begins. A medical report supports the fact the person meets the criteria of being incapacitated. The court visitor or investigator reports may not make any mention of alternatives. Substantial attorney's fees, expense and time have been incurred by the time of the court hearing and there will be disappointment if the appointment is not ordered in the next five minutes. The person probably needs some protection and it's too late for the Court to ask questions. Risk management by the Court becomes an issue. Under this presumptive and non-adversarial system, what can the Court do? Exploring the alternatives to guardianship is not an easy road for the Court to take. It is in the analysis of the "necessity" requirement that you find the alternatives to guardianship.

Evaluating alternatives to guardianship should begin before the petition is filed. It starts with education and re-education about the role of the guardian and guardianship and the resources available to meet the needs of individuals. The players to be educated include attorneys, physicians, social workers, judges, Adult Protective Services, mental health and healthcare providers and family.

There should be on-going promotion of guardianship alternatives, some of which are unique to each community. Several alternatives are by state statute and other guardianship alternatives involve some creativity by the players in the system. The players in the guardianship system need to have correct information about guardianship and the role of the guardian. Let's start with what should *not* be the role of the guardian. A guardian is *not*:

- ♦ A companion.
- ♦ A therapist.
- ♦ A reformer-guardian does not change lifestyles.
- ♦ A warden-guardian is not appointed to control a person.
- ♦ A savior.
- ♦ A surrogate family member.
- ♦ A caregiver.
- ♦ A healthcare provider.

Although guardians are often called upon to coordinate the above services or roles, the guardian's main responsibility is to (1) be a surrogate decision maker and (2) be an advocate for the incapacitated person. A guardian is to encourage maximum self-reliance and independence and arrange placement for the incapacitated person in the least restrictive setting. Some states such as Arizona have statutes that state the guardian "shall actively work toward limiting or terminating the guardianship and seeking alternatives to guardianship" A.R.S. §14-5312(7).

The guardianship alternatives include medical, community, legal and financial options.

Many of the alternatives below must be planned before one loses capacity, while others may be used to help someone who lacks some capacity. Because the terminology varies throughout the country, the term guardianship of the estate is equivalent to conservatorship for purposes of this article.

## Healthcare Surrogate Laws

Health care Surrogate or Consent laws exist in about half the states. These statutes authorize family members and next of kin to authorize medical decisions. Some states even allow two physicians to make the medical decision. It is surprising how often social workers in the healthcare community are unaware of these statutes. These statutes are useful when the major reason for the guardianship petition is to make medical decisions.

## Medical Or Health Care Power Of Attorney

It is usually too late when a guardianship petition is filed for a person to knowingly sign a Medical Power of Attorney. However, a person may not be capable of making medical decisions, but understand enough to appoint a surrogate decision-maker. It is important for this alternative that the person nominated be a trusted family member or close friend who is geographically near the person to be protected.

## Medical Advance Directives

Persons who execute advance directives for medical care often do not let family members or friends know about them. The advance directives are usually located in the physician's file or with hospital records. A guardianship focusing on medical decisions may be avoided with these documents. It should be noted that with the new HIPAA regulations, it may be difficult to access these records without the patient's consent.

## Living Will

A Living Will is provided by most state statutes. It is a form of advance directive usually related to providing instructions about the withholding of life sustaining treatment if one is terminally ill or unconscious. A person terminally ill may in some cases still be capable of making medical decisions.

## Community and Social Services Assistance

The arrangement of services will often avoid the need for guardianship. These services include home delivered meals, homemaker assistance, transportation services, companion services, counseling services and the various services at senior centers. It is important that attorneys, court investigators and others who are part of the guardianship system have a working knowledge of these community services.

## Guardianship: Consider the Alternatives

*Continued from page 7*

### Adult Protective Services

Many states have a protective services agency to assist in preventing elder abuse, neglect and financial exploitation. A case referral to these agencies may prevent the need for a guardianship in situations where the person in crisis needs short-term protection and assistance.

### Family Assistance

Provided there is reasonable family harmony, encouraging family members to assist with bill paying and coordination of medical and social services is a good alternative. Even when there is some disharmony in the family relationships, the protected person may prefer renewing the family relationships over formal court intervention.

### Financial Durable Power Of Attorney

The Financial Durable Power of Attorney can be a very useful tool when there is a small estate and trusted family members. It may not be an option to avoid guardianship if the person is already incapacitated. However, a person may not be able to handle their financial affairs, but be capable of making the decision as to *who* they want to handle their finances. The disadvantage with the Durable Power of Attorney is the dishonest agent abusing the powers without any accountability or court supervision.

### Joint Property Arrangements

For persons with small uncomplicated estates that have a few trusted family members, a joint property arrangement may prevent the need for the guardianship of the estate. Otherwise, it is not recommended.

### Representative Payee

When a person's income is largely social security or other government benefits, a representative payee may substitute for a guardianship of the estate. A representative payee also works well for a person who has mental capacity, but physically cannot manage day-to-day financial affairs.

### Money Management Alternatives

Persons without immediate family nearby are often referred for guardianship and conservatorship because of forgetting to pay utility bills, taxes, or rent that may cause a legal action for eviction or foreclosure. Direct deposit of benefit and income checks, as well as automatic payment of regular bills, may prevent the need for a guardianship proceeding. Community and volunteer programs can assist with these services. Persons with a substantial estate may hire a bill paying service or other professionals to assist.

### Trusts

The use of trusts is frequently advertised as a means to avoid probate. It is also a very effective way to avoid guardianship of the estate. Trusts prevent court intervention and gives direction under what terms the estate should be managed. A trust must be established by one with capacity, but the standard test in most states would be that the person has testamentary capacity.

### Limited Guardianship and Single Transaction

If a one-time medical decision is needed, a limited guardianship could be ordered to consent to medical treatment only. The authority of the guardian would end once the medical treatment was completed. Some states have a "single transaction" statute where a protective order may be issued without a guardian appointment. An example of the single transaction would be the approval to sell real estate.

While most states do not have the "single transaction" statute, I do not see why you could not use a limited guardianship of the estate action to achieve the same purpose as the single transaction statute. The limited guardianship would of course be more costly and not as expedient as the "single transaction" process, but would still be the least restrictive alternative for the person.

At Wingspan, the second national guardianship conference held on December 2, 2001, the following recommendations related to limited guardianship and single transactions were made:

"35. Guardianships be limited to the

circumstances giving rise to the petition for emergency or temporary guardianship, and be terminated upon appropriate showing that the emergency no longer exists."

"36. There be special procedures for single transactions."

### Mediation

Mediation should not be overlooked in helping families explore alternatives to guardianship. Mediation helps preserve family relationships and focuses on finding a mutually agreeable solution. Mediation may reduce contested court hearings and works toward least restrictive alternatives or a limited guardianship. Mediation is probably not available to most probate courts, but I expect there will be a growing trend in the use of mediation to avoid guardianship. As for the training and qualification of mediators, the recommended policy for probate courts is set forth in Wingspan recommendations numbers 22 and 24:

"22. Standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters.

**Comment:** Standards and training should include identification of issues appropriate for mediation, participants in the mediation, use and role of legal representatives, and procedures to maximize self-determination of individuals with diminished capacity . . . Mediators should adhere to such standards even if not statutorily required."

"24. Awareness of risks and benefits of guardianship and planning alternatives to guardianship be raised, and the use of mediation for conflict resolution and as a pre-filing strategy alternative be increased.

**Comment:** Conference co-sponsors should develop model educational curricula to be implemented by the bench, bar and medical profession on the state level. Education efforts should be targeted to financial and healthcare institutions, aging and disability advocates, legal and medical professionals, and the public."



## Guardianship: Consider the Alternatives

*Continued from page 8*

Some problems cannot be solved by guardianship or the above alternatives. Some social ills like excessive drinking, use of other drugs or unsafe sexual practices cannot be solved through a guardianship or alternative means. An adult who has legal capacity to manage his or her personal or financial affairs has the right to make decisions that others view as risky or unwise. There are eccentric individuals who choose to live in cluttered and/or squalid conditions. These individuals have what is described as the "right to folly" provided they are causing no significant risk or harm to themselves or others. Being poor, eccentric, homeless or a street person alone is not enough to justify a guardianship.

If you as a probate judge wish to make wider use of alternatives to guardianship in your community, here is a recommended action plan:

1. Establish an educational effort promoting alternatives to guardianship targeted at hospitals, nursing homes, and medical or psychological professionals. A starting point would be distribution of print materials and putting information on the court website.

2. Court investigators or visitors should be trained to explore the alternatives to guardianship and make separate findings of guardianship alternatives in their reports to the court.

3. Assist in establishing a separate program or resource to assess the need for guardianship of the person or estate that will resolve issues outside the probate court system.

4. Amend the guardianship forms to provide for separate allegations in the petitions to address the exploration of alternatives and the necessity for guardianship. Medical diagnosis alone is not enough to justify a guardianship.

5. Explore legislation to address statutory provisions for medical treatment decisions and single transactions.

6. Assist in setting up a guardianship mediation program.

The National Probate Court Standards provides excellent guidelines regarding guardianship alternatives. Standard 3.3.2 states that the probate court should establish a process for screening all guardianship petitions and diverting inappropriate petitions. By providing an early screening of petitions, the court can minimize the expense, inconvenience, and possible indignity

incurred by the individual and conserve the resources of the court.

Standard 3.3.10 entitled "Less Intrusive Alternatives" encourages the use of limited guardianships and taking into account the wishes of the respondent, and "maximizing coordination and cooperation with social service agencies in order to find alternatives to guardianships." The *Commentary* in this standard addresses the impact the imposing of a guardianship may have on a person: "Scientific studies show that the loss – or perceived loss – of a person's ability to control events can lead to physical or emotional illness. Indeed, complete loss of status as an adult member of society can act as a self-fulfilling prophecy and exacerbate any existing disability. Allowing persons potentially subject to guardianships to retain as much autonomy as possible may be vital for their mental health." This is a compelling reason for courts to consider and encourage the use of alternatives before establishing a guardianship.

*Richard T. Vanderheiden is the immediate past chairman of the National Guardianship Foundation.*

## Mark Your Calendars!



**What: AFA Spring Conference**

**When: May 13-14, 2004**

**Where: Lake Havasu, AZ**

**Watch your mailbox for more information!**

# Arizona Fiduciaries Association, Inc.

An Affiliate of the National Guardianship Association

P.O. Box 422, Tucson, AZ 85702-0422

## Calendar of Events

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### JANUARY 12, 2004

Six-hour video presentation of Flagstaff training session provided by AOC Fiduciary Certification Program. See AOC website for details

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### FEBRUARY 20, 2004

Video of 4-hour Tucson Renewal Training Session provided in Phoenix by AOC Fiduciary Certification Program. See AOC website for details.

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### FEBRUARY

Mental Health & Elder Law Section Seminar  
*Date not available at time of press. Will post on AFA listserv.*

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### MARCH 16, 2004

Video of 4-hour Tucson Renewal Training Session  
Provided in Phoenix by AOC Fiduciary Certification Program. See AOC website for details.

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### APRIL 27-29, 2004

Final Initial Certification Training and Examination provided in Phoenix by AOC Fiduciary Certification Program. See AOC website for details.

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### MAY 6-7, 2004

Regional Guardianship Conference at Heatherman Lodge, Vancouver, WA. For more information visit [www.gacoregon.org](http://www.gacoregon.org).

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### MAY 13-14, 2004

Arizona Fiduciaries Association Spring Conference in Lake Havasu, Arizona

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### NOVEMBER 11-14, 2004

National Guardianship Association Annual Meeting, joint conference with the National College of Probate Judges and the National Academy of Elder Law Attorneys. Visit [www.guardianship.org](http://www.guardianship.org) for more information.